No. [illegible]

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1960

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Wayne R. Glock, Et Al.,
Respondents.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

G. A. McDowell, Et Al.,
Respondents.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Claude C. Johnson,
Respondent.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Robert E. Johnson,
Respondent.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

H. F. Garton,
Respondent.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

Dean Williams, Et Al.,
Respondents.

A. H. Carpenter, Et Al.,
Petitioners,
v. No.

R. R. Calvert, Et Al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

THOMAS D. SHUMATE,
SHUMATE & SHUMATE,

M. A. ROMADY,

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XI. Have the respondents been damaged by reason of the quality of the gas when it is shown in the record without contradiction that this gas is much more valuable than 15 cents per 1,000 cubic feet for the purposes for which it is being used, to repressure a large oil field in order to cause greater production of oil? 26

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IN THE

Supreme Court of the United States

October Term, 1960

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

WAYNE R. GLOCK, ET AL., - - *Respondents.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

G. A. MCDOWELL, ET AL., - - *Respondents.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

CLAUDE C. JOHNSON, - - - - *Respondent.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

ROBERT E. JOHNSON, - - - - *Respondent.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

H. F. GARTON, - - - - - *Respondent.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

DEAN WILLIAMS, ET AL., - - - *Respondents.*

A. H. CARPENTER, ET AL., - - - *Petitioners,*

v. No. _____

R. R. CALVERT, ET AL., - - - *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

A. H. Carpenter and Margaret L. Carpenter pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered on January 13, 1961, in the proceedings entitled as follows: A. H. Carpenter, *et al.* v. Wayne R. Glock, *et al.;* A. H. Carpenter, *et al.* v. G. A. McDowell, *et al.;* A. H. Carpenter, *et al. v.* Claude C. Johnson; A. H. Carptenter, *et al.* v. Robert E. Johnson; A. H. Carpenter, *et al.* v. H. F. Garton; A. H. Carpenter, *et al.* v. Dean Williams, *et al.;* and A. H. Carpenter, *et al.* v. R. R. Calvert, *et al.*

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Sixth Circuit is printed as Appendix A hereto. It has not been officially reported.

The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing, dated March 10, 1961, and the order of said court denying the supplemental petition for rehearing, dated March 13, 1961, are printed as Appendix B hereto.

The opinion of the United States District Court for the Eastern District of Kentucky, dated January 6, 1960, is printed as Appendix C hereto. It is officially reported in 184 F. Supp. 829.

The opinion in the companion case of Terrill v. Carpenter is printed as Appendix E hereto, and is officially reported in 143 F. Supp. 747, 249 F. 2d 142. (Mr. Justice Potter Stewart sat in this case with Judges Allen and McAllister.)

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 13, 1961. The order of said court denying the petition for rehearing was entered on March 10, 1961, and the order of said court denying the supplemental petition for rehearing was entered on March 13, 1961. The order of said court staying the issuance of mandate for 30 days for time to make petition for writ of certiorari was entered on March 22, 1961.

The aggregate amount of the judgments, interest, penalty and costs against the petitioner, A. H. Carpenter, is approximately $120,000.00.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c) and the Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED.

I. Can the respondents recover the purchase prices paid for interests in oil and gas leases in actions of fraud, proving only the amounts so paid as the measure of damages, as common law actions, and also be permitted to retain the valuable interests so purchased, under the laws of the Commonwealth of Kentucky?

II. Can respondents recover at common law in Kentucky on contracts induced by fraud where the success or failure of the investments depend on future events, and when after full knowledge of the facts alleged, they ratified the contracts by selling the gas produced and receiving the proceeds therefrom?

III. Can the respondents recover against the petitioners when they, after learning of the true analysis of the gas, have executed sale orders to sell the gas and have continued to sell the gas and are now doing so?

IV. Were the rights of A. H. Carpenter violated under the provisions of the Constitution of the United States and particularly the Fifth Amendment thereof by permitting the respondents to retain the valuable properties he sold them and to recover from him the full purchase prices paid?

V. Since Dr. G. A. McDowell signed the same release that was signed by Dr. R. W. Terrill on the 15th day of April, 1951, long after he knew the true analysis of the gas, are his actions herein barred against the petitioners as held in the case of Terrill *v.* Carpenter, 143 F. Supp. 747, 249 F. 2d 142, and the cases therein referred to, when he testified to no facts in avoidance of the release?

VI. Dr. H. F. Garton plead an unconditional release after full knowledge of all of the facts and in avoidance of it, and the petitioners likewise alleged the release, and no evidence was introduced in avoidance of the release, and recovery was permitted by him; and why are his actions not barred by the pleadings?

VII. The Statute of Limitations of Kentucky is fully dealt with in the companion case of Terrill v. Carpenter aforesaid, and why was not the Statute of Limitations which was plead in all of these actions applied in these cases as was applied in the Terrill case?

VIII. The discovery well was on the Garrett farm. The four producing gas wells in which respondents invested are located on the properties adjacent to the Garrett farm and are known as the Smyth, Wise, Wasson and Nicholas farms. Dry wells were drilled on the Wells and Hall leases approximately seven miles from the producing wells. The Hall and Wells leases are shown to be north of the Irvine-Pitcairn fault line, and the geological formations are shown not to be the same as the four producing properties, and there is no evidence of any representations concerning the Hall and Wells properties. By what legal authority did the court refund the monies to respondents paid for interests in the Hall and Wells properties?

IX. Since the only grounds alleged for recovery in these cases is the quality of the gas as containing approximately 42 per cent carbon dioxide and some sulphur, and it is shown that the market value of gas at the well head without such content was 15 cents per 1,000 British Thermal Units per 1,000 cubic feet, and the B. T. U. content of the gas was reduced by reason of the CO_2 content and sulphur, and the respondents appointed H. R. Witt their agent to sell the gas on a B. T. U. content basis, which is being sold by them at 9.39 cents per 1,000 cubic feet, why would not the

respondents be limited to recover the difference between 9.39 and 15 cents were 1,000 cubic feet or 5.61/15 part of the fair market value of these properties as of the date of the investments, or at the most the same percentage of the purchase prices paid if the Court should think the purchase prices paid are a proper criterion for damages?

X. How can the petitioners be charged with the depletion of the producing gas wells when it is alleged by the respondents that the wells were of tremendous volume and the rock pressure was 772 pounds which is proven by respondents' expert witness, W. B. Maxwell, to be normal?

XI. Have the respondents been damaged by reason of the quality of the gas when it is shown in the record without contradiction that this gas is much more valuable than 15 cents per 1,000 cubic feet for the purposes for which it is being used, to repressure a large oil field in order to cause greater production of oil?

STATUTE INVOLVED.

Kentucky Revised Statutes, Sections 413.120 and 413.130:

"413.120. Actions to be brought within Five Years.

"The following actions shall be commenced within five years after the cause of action accrued:

* * * * * * *

"(12) An action for relief or damages on the ground of fraud or mistake."

"413.130. When certain actions in KRS 413.120 accrue; regulations for.

* * * * * * *

"(3) In an action for relief or damages for fraud or mistake, referred to in subsection (12) of KRS 413.120, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. However, the action shall be commenced within ten years after the time of making the contract or the perpetration of the fraud."

STATEMENT.

This petition seeks review of judgments of the United States Court of Appeals for the Sixth Circuit affirming the judgments of the United States District Court for the Eastern District of Kentucky at Lexington, Kentucky which rendered judgments against the petitioners.

This petition deals with seven cases containing many different issues, and we ask the indulgence of

this Court for the length of this petition as we are unable to state the material facts and issues in briefer terms.

These actions were commenced by the respondents on dates as follows:

Wayne R. Glock, *et al.*	July 3, 1953
G. A. McDowell, *et al.*	July 13, 1953
Claude C. Johnson	July 27, 1953
Robert E. Johnson	July 27, 1953
H. F. Garton	July 27, 1953
Dean Williams, *et al.*	February 1, 1954
R. R. Calvert, *et al.*	February 5, 1954

We will refer to each case by the last name of each respondent. These actions were instituted to recover the purchase prices of oil and gas leases, in the beginning as equitable actions without a tender back of the interests they purchased.

The case of Terrill v. Carpenter, 143 F. Supp. 747, 249 F. 2d 142, is a companion case to the cases at bar, and it was first tried by the United States District Court for the Eastern District of Kentucky and recoveries denied, which was affirmed by the United States Court of Appeals for the Sixth Circuit and reported.

After the decision in the Terrill case, substituted complaints were filed in these cases seeking recoveries for the purchase prices paid, and the name of the actions were changed from equitable to common law which actually did not change the nature of the actions. The district court rendered judgments for the full purchase prices paid and let the respondents retain

the valuable properties so purchased which violates the rights of the petitioners guaranteed to them by the Constitution of the United States and especially the Fifth Amendment thereto as depriving the petitioners of their property without due process of law.

The basis for federal jurisdiction in the district court was 28 U. S. C., Sections 1332 and 2201, the petitioners being citizens of the Commonwealth of Kentucky and the respondents being citizens of the State of Indiana, being diversity of citizenship cases and the amounts in controversy in each case exceeding exclusive of interest and costs, the sum of $3,000.00.

From adverse judgments of the district court the petitioners appealed to the United States Court of Appeals for the Sixth Circuit, and said judgments

FACTS.

were affirmed by said court.

The sole grounds alleged in the complaints as fraudulent concerned the quality of the gas. They alleged the gas wells when drilled were of tremendous volume and on account of approximately 42 per cent of the gas being carbon dioxide (CO_2) and some sulphur that the gas could not be turned directly into the pipe lines at the market price which was 15 cents per thousand British Thermal Units per one thousand cubic feet, and that the petitioner, A. H. Carpenter, knew the contents of the gas of the discovery well which was adjacent to the Smyth, Wise, Wasson and Nicholas farms at the time he sold interests to re-

spondents and the likelihood of the gas under said adjacent farms being of the same quality as that on the Garrett well..

The only distinguishing feature between these cases and the Terrill case is the fact that Carpenter knew of the analysis of the gas of the Garrett well before selling interests to the respondents in the adjacent leases and the probability that the four adjacent properties would produce the same kind of gas. The holdings of the court in these cases are in direct conflict with the holdings in the Terrill case, which correctly reflects the laws of Kentucky.

Recoveries were permitted in the Hall and Wells leases which were shown without contradiction to have been drilled over six and a half miles from the producing wells and north of the Irvine-Pitcairn fault which is shown to divide the surface of the earth to the granite or true earth, and shown by reputable geologists without contradiction to not be upon the same geological formations as the Garrett property and those properties containing the four producing wells. The Garrett and the properties with the four producing wells are shown to be south of the fault line.

The Garrett well was drilled in the Fall of 1947, and thereafter interests were sold in the oil and gas leases containing the productive wells adjacent to the Garrett property and thereafter in the Hall and Wells leases aforesaid.

After the petitioners and respondents examined the costs of a separation plant to sell the commercial gas

on the market and to manufacture dry ice out of the CO_2 content of the gas and to market the sulphur content, after respondents learned of the true analysis of the gas, which was in December 1948 and the first days of January 1949, in the early part of 1952 they executed powers of attorney to H. R. Witt, a petroleum engineer, who also had interests in the gas wells, to sell this gas at the well-head in accordance with the B. T. U. content of the gas at the rate of 15 cents pere 1,000 B. T. U. per 1,000 cubic feet; and since that time they have been selling the gas from these four producing gas wells at 9.39 cents per 1,000 cubic feet, and same is being purchased and used to repressure a large oil field near these properties by the Gulf Oil Corporation which owns productive wells in the vicinity.

All of the investments by the respondents in the four producing gas wells and in the Hall and Wells leases were made in the year 1948. Some representations were proven as to the four producing gas wells as to the quality of the gas, but none of the respondents testified that any representations were made before their investments in the Hall and Wells tracts. Non-productive wells were drilled on the Hall and Wells tracts after the completion of the four gas producing wells.

The petitioners filed their answers denying the fraud, pleading the five-year Statute of Limitations of the Commonwealth of Kentucky and alleging that in 1952 the respondents executed powers of attorney to Mr. Witt to sell the gas on the B. T. U. basis and had been selling same continuously since that time and

by virtue thereof they ratified the contracts and condoned any fraud that existed and were estopped to maintain these actions. In addition thereto in the McDowell case the petitioners plead the unconditional release, which same release was signed by Terrill, as a bar to his actions, and which release was expressly upheld in the Terrill case. In the Garton case the respondent plead the execution of an unconditional release and in avoidance of it, and the petitioners also set up this release in their defensive pleadings, and no evidence was introduced in avoidance of the release, which burden of proof was upon Garton, and the release so plead by both parties is not identified as being the release signed by Terrill and McDowell, but the district court gave judgment to Garton regardless of these pleadings.

REASONS FOR GRANTING THE WRIT.

The District Court for the Eastern District of Kentucky, affirmed by the Sixth Circuit Court of Appeals, has not correctly applied the laws of the Commonwealth of Kentucky material to the issues presented in these cases, and the judgments award to the respondents the purchase prices paid, crediting same only with the amount of the proceeds from the gas as received by them to the approximate date of the judgments, and permitting them to retain their valuable interests in the four producing gas properties, thereby depriving the petitioner, A. H. Carpenter, of his property without due process of law secured to him by the

Constitution of the United States and especially the Fifth Amendment thereof.

The evidence discloses without contradiction that the respondents were owed for approximately 30,000,000 cubic feet of gas by Mr. H. R. Witt, their trustee, which had not been paid by the Gulf Oil Corporation to the trustee at the time of the judgments, and no credit was given for the amount owing by the Gulf Oil Corporation.

The district court in the opinion states that the gas had little *commercial* value, but the court did not take into consideration that the gas had value. The word "commercial" was defined in the proof by geologist W. B. Maxwell as gas ready to turn into the lines for public consumption.

ARGUMENT OF THE CASE.

I. Can the Respondents Recover the Purchase Prices Paid for Interests in Oil and Gas Leases in Actions of Fraud, Proving Only the Amounts so Paid as the Measure of Damages, as Common Law Actions, and Also Be Permitted to Retain the Valuable Interests so Purchased, Under the Laws of the Commonwealth of Kentucky?

In Kentucky it is definitely settled that in actions for fraud where the purchase price is sought to be recovered, same are rescission actions and must be brought within a reasonable time after the discovery of the fraud, and any act of the vendee inconsistent with the ownership of the vendor thereafter ratifies the fraud, and the vendee is thereafter estopped to main-

tain the action. It is further held without contradiction that in all such cases the property received must be tendered back with the complaint.

Cox v. Riggins, 223 Ky. 570, 4 S. W. 2d 403; Dolle v. Melrose Properties, Inc., 252 Ky. 482, 67 S. W. 2d 706; Johns v. Masterson, 176 Ky. 399, 195 S. W. 819; Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S. W. 2d 1; Summers v. Carpenter, 156 Ky. 237, 160 S. W. 1064; Hartford Life Insurance Co. v. Hamblin, 139 Ky. 346, 104 S. W. 727.

The district court in its opinion referred to Dunn *et ux* v. Tate, 268 S. W. 925, as contrary to the rule in the cases aforesaid. In that case an action was sought to recover damages by reason of false representations that the house was water tight and the roof and the basement did not leak. However, in that opinion the previous cases referred to herein were distinguished on the ground that the previous cases being for the purchase price paid were in fact rescission cases regardless of whether they were called equitable or common law cases. The case of Dunn v. Tate was not a case for any part of the purchase price paid.

It is stated in the Head case, which is the law of Kentucky, as follows:

> "Where fraud had been committed in the obtaining of a contract, it may be taken advantage of in two forms: (1) By an affirmance of the contract and a recovery of damages for the injury; (2) by a disaffirmance of the contract and a recovery of the thing parted with as the consideration. By the latter, the contract is treated as a

> nullity. This mode can only be adopted upon certain terms; those terms are: That he surrender or tender a surrender within a reasonable time to the other contracting party the thing which he has received under the disaffirmed contract. He is not permitted to hold onto the thing which he has received and successfully effect a restoration of the thing which he has parted with under the contract."

To the same effect is Sparks v. Baker, 272 Ky. 663, 114 S. W. 2d 1145.

II. Can Respondents Recover at Common Law in Kentucky on Contracts Induced by Fraud Where the Success or Failure of the Investments Depend on Future Events, and When After Full Knowledge of the Facts Alleged, They Ratify the Contracts by Selling the Gas Produced and Receiving the Proceeds Therefrom?

This can not be done under Kentucky law, and we refer the Court to the recent case of the Court of Appeals of Kentucky decided February 2, 1960, being the case of Hampton v. Suter, reported in 330 S. W. 2d 402, which contains the last utterance of the Court of Appeals of Kentucky relevant to the issues presented in these cases. We quote from that opinion as follows:

> "Fraud inducing a contract may be waived by affirmance that is equivalent to ratification of the contract by the party who claimed to have been deceived into entering into it. That ratification may be shown by his acts after he acquired full knowledge of the real facts and had shown a clear intent

to affirm the contract despite the fraud, as where he accepted the benefits thereof or acted in a manner inconsistent with repudiation. The intention may be in part shown by a failure to act promptly to repudiate the transaction. 17 C.J.S. Contracts Sec. 165b; 24 Am. Jur., Fraud and Deceit, Sec. 209; Cox v. Riggins, 223 Ky. 510, 4 S. W. 2d 403; Gargotto v. Sherman, 297 Ky. 597, 180 S. W. 2d 565; Barrowman Coal Corp. v. Kentland Coal & Coke Co., 302 Ky. 803, 196 S. W. 2d 428.

"Ordinarily, one claiming to have been defrauded into making a contract has an option either to disaffirm the contract and seek its rescission or to affirm the contract and seek his remedy by an action for damages; he may not follow inconsistent remedies. Webb v. Verkamp Corp., Ky., 254 S. W. 2d 717. He has but one election, and if he affirms the contract, his election is irrevocable and he condones the fraud. Perkins v. Jackson, 276 Ky. 217, 123 S. W. 2d 247. The inconsistency of the prayer of the complaint in the instant case does not seem to have been challenged.

"It is readily apparent that the plaintiff was not entitled to a rescission of the contract for he did not move promptly and was unable to restore the consideration for the contract, or the status quo ante of the business purchased. So, we are concerned only with the question of whether or not the plaintiff was entitled to a judgment for damages by the court or the submission of the issue to a jury on the ground of failure of consideration.

"The rule of waiver of fraud and ratification of a contract may be applicable to an action for damages for breach of the contract as well as to

a suit to rescind. Hampton accepted the fraudulently induced contract relating to the Buick agency as fulfilling the consideration requirement and could not await the result of the adventure and then repudiate it. In Summers v. Carpenter, 156 Ky. 337, 160 S. W. 1064, it was held that a party claiming to have been induced by fraud to enter into a contract of purchase of property had waived his right of action for damages by his acts and conduct after having discovered the alleged fraud."

It will therefore be observed:

(1) That any actions for the purchase price paid as the result of fraud are rescission cases.

(2) Where the success or failure of an investment depends upon future events, the person defrauded condones the fraud in those cases where he learns of the fraud and abides by the contract instead of disaffirming it within a reasonable time after learning of the fraud.

The Hampton case aforesaid reaffirms the law in Cox v. Riggins which was cited with approval in the Terrill opinion. The case of Dunn v. Tate does not overrule that case but distinguishes it, but the Hampton case reaffirms it and the other cases herein referred to.

III. Can the Respondents Recover Against the Petitioners When They, After Learning of the True Analysis of the Gas, Have Executed Sale Orders to Sell the Gas and Have Continued to Sell the Gas and Are Now Doing So?

We respectfully submit they can not as discussed under the two previous headings.

IV. Were the Rights of A. H. Carpenter Violated Under the Provisions of the Constitution of the United States and Particularly the Fifth Amendment Thereof by Permitting the Respondents to Retain the Valuable Properties He Sold Them and to Recover From Him the Full Purchase Prices Paid?

This question was raised in the United States Court of Appeals for the Sixth Circuit. We submit that in these cases the valuable properties of Mr. Carpenter were permitted to be retained by the respondents and they recovered the purchase prices paid, credited with the amounts received from gas as aforesaid. The considerations they paid have been restored to them, and they have been permitted to keep the properties.

We refer the Court to 11 American Jurisprudence, Sections 334 and 335, pages 1143-1147, inclusive; Terrace v. Thompson, 263 U. S. 197; Buchanan v. Warley, 245 U. S. 60; Lynch v. United States, 292 U. S. 571.

V. Since Dr. G. A. McDowell Signed the Same Release That Was Signed by Dr. R. W. Terrill on the 15th Day of April, 1951, Long After He Knew the True Analysis of the Gas, Are His Actions Herein Barred Against the Petitioners as Held in the Case of Terrill v. Carpenter, 143 F. Supp. 747, 249 F. 2d 142, and the Cases Therein Referred to, When He Testified to No Facts in Avoidance of the Release?

The holding of the district court and that of the Sixth Circuit Court of Appeals is not understandable to us because this release was expressly upheld in the Terrill case as releasing all claims. This release was executed long after all of the investments were made by the respondents and after full knowledge of the quality of the gas. We refer the Court to the Terrill case construing this release.

VI. Dr. H. F. Garton Plead an Unconditional Release After Full Knowledge of All of the Facts and in Avoidance of It, and the Petitioners Likewise Alleged the Release, and No Evidence Was Introduced in Avoidance of the Release, and Recovery Is Permitted by Him; and Why Are His Actions Not Barred by the Pleadings?

There was no evidence introduced concerning the release of Dr. Garton, and it is not identified as the same release signed by Drs. McDowell and Terrill. How can lawyers practice law when they can not rely upon the pleadings in the case? This was brought to the attention of the district court and to the circuit court of appeals, and we were unable to get any action on it. We raised these questions in our motion and

grounds for new trial in the district court and the two additional briefs were prepared in that court as well as the release signed by McDowell and Terrill.

VII. The Statute of Limitations of Kentucky Is Fully Dealt With in the Companion Case of Terrill v. Carpenter Aforesaid, and Why Was Not the Statute of Limitations Which Was Plead in All of These Cases Applied in These Cases as Was Applied in the Terrill Case?

A large number of the claims of the respondents are barred by the five-year Statute of Limitations of Kentucky. It is shown in the record without contradiction that Dean Williams and Dr. R. R. Calvert instituted their actions in February 1954, and not only more than five years after their investments but more than five years after the discovery of the true quality of the gas.

There is no evidence shown by any of the respondents of any diligence, and we refer the Court to the Terrill opinion which correctly sets forth the law in Kentucky construing the Statute of Limitations but which case was not followed in the cases at bar.

VIII. The Discovery Well Was on the Garrett Farm. The Four Producing Gas Wells in Which Respondents Invested Are Located on the Properties Adjacent to the Garrett Farm and Are Known as the Smyth, Wise, Wasson and Nicholas Farms. Dry Wells Were Drilled on the Wells and Hall Leases Approximately Seven Miles From the Producing Wells. The Hall and Wells Leases Are Shown To Be North of the Irvine-Pitcairn Fault Line, and the Geological Formations Are Shown Not To Be the Same as the Four Producing Properties, and There Is No Evidence of Any Representations Concerning the Hall and Well Properties. By What Legal Authority Did the Court Refund the Monies to Respondents Paid for Interests in the Hall and Wells Properties?

Again we refer the Court to the Terrill opinion which refers to the case of Engemann v. Allen, Trustee, 201 Ky. 483, 484, which holds that any representations concerning the continued production of oil and gas or whether or not the drilling of a well will produce oil and gas are not material representations because one alleged to be defrauded must know that such representations could not be true and must know that there is no way of ascertaining the continued production of oil and gas or whether or not the drilling of a well will produce oil or gas and such representations could not be relied upon. The Terrill opinion deals exhaustively with this issue.

If the decision with regard to the Hall and Wells tracts stands, the respondents could have recovered for interests in oil and gas leases sold located anywhere. The wells were drilled on the Hall and Wells tracts

primarily for oil, and the Hall well was drilled to the granite which cost Mr. Carpenter approximately $75,000.00. The locations for the wells on these two tracts were made by the chief geologist of the California Company, a large producing corporation of the Standard Oil group, which corporation had large number of leases north of the fault line and wanted those test wells drilled.

IX. Since the Only Grounds Alleged for Recovery in These Cases Is the Quality of the Gas as Containing Approximately 42 Per Cent Carbon Dioxide and Some Sulphur, and It is Shown That the Market Value of Gas at the Well Head Without Such Content Was 15 Cents Per 1,000 British Thermal Units Per 1,000 Cubic Feet, and the B.T.U. Content of the Gas Was Reduced by Reason of the CO_2 Content and Sulphur, and the Respondents Appointed H. R. Witt Their Agent to Sell the Gas on a B.T.U. Content Basis, Which Is Being Sold by Them at 9.39 Cents Per 1,000 Cubic Feet, Why Would Not the Respondents Be Limited to Recover the Difference Between 9.39 and 15 Cents Per 1,000 Cubic Feet or 5.61/15 Part of the Fair Market Value of These Properties as of the Date of the Investments, or at the Most the Same Percentage of the Purchase Prices Paid if the Court Should Think the Purchase Prices Paid Are a Proper Criterion for Damages?

The respondents proved no measure of damages but only the amount of money they paid for these properties. The petitioners introduced evidence showing the difference between the fair market value of these properties as of the date the interests were sold to the respondents containing the quality of gas ready to turn

into the pipe line for public consumption and with the gas as actually analyzed. It is shown by such evidence that there is no difference in the fair market value of these properties due to the fact that the gas is more valuable than commercial gas for repressuring oil wells and has a greater market value than 15 cents per 1,000 cubic feet. The evidence of Mr. Groppe, one of the great experts in the country, disclosed that this gas for the purposes for which it is being used is worth in excess of one dollar per 1,000 cubic feet because carbon dioxide is more valuable than the methane gas by reason of the fact that it does not disintegrate and can be resacked and reused while methane gas has a tendency to liquefy.

It is established in this record without contradiction that there is a market for all of this gas in the adjacent oil fields, and it is being marketed and sold by the respondents for much less than it is worth.

The Court of Appeals of Kentucky applies the rule as to damages which can be best measured. In the case of Western Union Telegraph Co. v. Guard, 283 Ky. 187, 139 S. W. 2d 722, it is stated that one is entitled to compensation for the injuries sustained but is not to be placed in a better position than he would have been had the wrong not been done, that only such damages are recoverable for a tort as can be shown with reasonable certainty and as are the direct natural and proximate consequences of the defendant's wrongful act.

We further refer the Court to Kentucky Utilities Co. v. Consolidated Telephone Co., 252 S. W. 2d 437, which is another case of conforming damages.

Another case of conforming damages is the case of Nunn v. Howard, 288 S. W. 678, 216 Ky. 685, wherein the Court held that where it was represented that a well on the land had lasting and good water that the measure of damages was the cost of drilling another well.

It appears this Court follows this rule. Sighuf v. Porter, 179 U. S. 116; Smith v. Bowles, 132 U. S. 125; Elbidge v. Steelwagon Manufacturing Co., 279 U. S. 841; Farquhal v. Hensley, 275 U. S. 561.

Cases in Kentucky adopting the measure of damages as the difference between the fair market value of the property as represented and as it was are: Elesey v. Lampkin, 162 S. W. 106, 156 Ky. 836, that the damages for concealment of a cemetery on the farm was held to be the difference between the fair market value of the farm without the cemetery and with it; Bunch v. Bertram, 219 Ky. 848, 294 S. W. 805, that the measure of damages for representations that the basement did not leak was the difference in the fair market value of the property as represented and as was.

The district court in effect charged Carpenter with the depletion of the producing wells, and we submit this was error. The wells had depleted more than the usual gas wells. The question material here is what damages have been sustained by the respondents by reason of the quality of the gas. If we were to con-

cede, which we do not, that the gas is being sold at a fair price, the only damages recoverable by the respondents would be the difference between 9.39 cents per 1,000 cubic feet and 15 cents per 1,000 cubic feet, which would be, as we contend, 5.61/15 part of the fair market value of these properties as of the date of the investments or of the purchase price paid for these producing properties. Indeed this would be the proper measure of damages by reason of the CO_2 and sulphur content of the gas. Surely the respondents should not be permitted to recover the purchase prices paid and be permitted to keep the properties. Such holding is not understandable to us. Conforming damages should be applied in these cases as same can be applied with certainty.

The district court referred to the case of Sanders v. Chesmotel which involved new personal property, and the measure of damages as to new personal property is different from used personal property and real estate transactions. The court there permitted a recovery of the purchase price paid but credited the fair market value of the air conditioners against the purchase price.

There is no case in Kentucky whereby one can recover the purchase price for real estate on the grounds of misrepresentation except in rescission cases, and in those cases the property must be tendered back and a disaffirmance of the contract within a reasonable time after the discovery of the fraud.

X. How Can the Petitioners Be Charged With the Depletion of the Producing Gas Wells When It Is Alleged by the Respondents That the Wells Were of Tremendous Volume and the Rock Pressure Was 772 Pounds Which Is Proven by Respondents' Expert Witness, W. B. Maxwell, To Be Normal?

If the opinion and judgments in these cases are permitted to stand, the vendor of oil properties would be charged with warranting the future production of the properties. These producing wells were of large volume with a normal rock pressure, and surely this Court will not permit Mr. Carpenter to be charged with the depletion of the wells.

The only ground relied upon in the complaints of the respondents is the quality of the gas and not the volume nor future production of the gas.

XI. Have the Respondents Been Damaged by Reason of the Quality of the Gas When It Is Shown in the Record Without Contradiction That This Gas Is Much More Valuable Than 15 Cents Per 1,000 Cubic Feet for the Purposes for Which It Is Being Used, to Repressure a Large Oil Field in Order to Cause Greater Production of Oil?

Mr. Henry Gröppe, a chemical engineer of Houston, Texas, among whose clients are the large pipe lines transporting gas from the southwest to the Eastern part of the United States, testified that the gas in the four producing wells which had a market in the oil fields for repressuring oil wells was actually worth more than one dollar per 1,000 cubic feet for the reasons previously stated herein.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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